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No. 86-174

In The
Supreme Court of the United States
October Term, 1986

MAHAN & ROWSEY, INC.,

Petitioner,

v.

OKLAHOMA NATURAL GAS COMPANY,
a division of ONEOK Inc.,
a Delaware corporation,

Respondent.

On Petition For A Writ Of Certiorari to the United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Oklahoma Natural Gas Company, prays that the petition of Mahan & Rowsey, Inc. for writ of certiorari seeking review of the Opinion of the United States Court of Appeals for the Tenth Circuit be denied.

THE OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit which appears in appendix A to the petition for writ of certiorari is reported at 786 F.2d 1004.[1]

[1] The references to the petition for writ of certiorari are hereinafter cited as "Pet.", and references to the opinions below which appear in the appendices to the petition for writ of certiorari are hereinafter cited as "App. —."

STATEMENT OF THE CASE

Respondent, Oklahoma Natural Gas Company ("ONG")[2], is a public utility distributing natural gas to residential, commercial and industrial customers in the State of Oklahoma. The overall demand for gas fluctuates widely with the season: in cold winter months demand is much greater than in the hot summer. To meet these fluctuations, ONG has converted a depleted gas field into the equivalent of a huge underground storage tank. The reservoir, termed the Depew Gas Storage Reservoir, utilizes an underground formation known as the Dutcher sandstone.

ONG injects natural gas into this reservoir throughout the summer months, and withdraws gas during the winter months. This causes wide but regular fluctuations in gas pressure in the underground formation, readily measurable at the locations of several observation wells where the reservoir pressure is constantly monitored.

Mahan & Rowsey, Inc. ("MRI") drilled two wells, known as the Manes #1 and Manes #3, at a location near the outer perimeter of the underground storage reservoir, both of which were prolific producers of gas. ONG concluded that each of the wells was producing from its underground storage reservoir; and accordingly sought an injunction to stop further production from the wells, and also claimed all proceeds of sales of gas therefrom. MRI having sought protection of the federal bankruptcy laws pursuant to Chapter 11, the action took the form of an

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[2] Oklahoma Natural Gas Company is the public utility division of ONEOK Inc., a Delaware corporation. In the caption of the petition for writ of certiorari, Oklahoma Natural Gas Company was incorrectly identified as "Oklahoma Natural Gas."

adversary proceeding in the United States Bankruptcy Court for the Western District of Oklahoma.

The case raised no novel or unsettled questions of law; and indeed no substantial questions of law at all. The only issue was purely a question of fact: whether the wells tapped the ONG storage reservoir or an entirely separate accumulation of native natural gas.

The trial before the Bankruptcy Court was a classic battle of experts, as is to be expected when property rights depend upon physical conditions several thousand feet underground. ONG, accepting the burden of proof, produced both geological and engineering testimony from professionally qualified witnesses, and MRI did likewise. ONG's geological expert showed the depositional pattern of the Dutcher sandstone, and that the formation extended to the location of the Manes wells. A paleontologist further showed that fossil remains from samples taken from the Manes wells were identical to those found in the Dutcher, but not in other formations. The MRI geologist, however, asserted that the Manes wells were completed in the Morrow sandstone, an entirely different formation separated from the Dutcher by an impermeable shale barrier. This conclusion was negated, as both the Bankruptcy Court and District Court noted (App. B, at 9b; App. C, at 8c), by the fact that the bottom hole pressures measured at the Manes wells mirrored the pressure fluctuations in the ONG storage reservoir, a physical impossibility if an impermeable shale barrier existed as MRI claimed.

ONG's engineering witness showed that the chemical composition of gas from the Manes wells was virtually identical to the storage gas, and markedly different from

native Dutcher gas; that comparisons of a Carbon 13 gas analysis and a formation water analysis produced similar results; and that helium was present in the gas from both the Manes wells and the storage reservoir, but rarely, if ever, present in native Dutcher gas. Bottom hole pressure measurements showed that the initial pressure in the Manes wells was much different from that of a virgin Dutcher reservoir, but the same as the storage reservoir pressure in nearby observation wells. Pressure decline curves showed that the gas pressure at the Manes wells was increasing as more gas was produced, a physical impossibility unless the wells were in the gas storage reservoir. Highly sophisticated pressure testing techniques, including interference tests and pulse tests, showed that there was direct gas communication through gas saturated rock between the Manes wells and observation wells completed in the storage reservoir. A computer generated model of the storage reservoir demonstrated that the actual measured pressures in the various wells were in fact as they were predicted to be if the gas taken from the Manes wells had come from the ONG storage reservoir, but not otherwise.

MRI produced engineering testimony in an effort to refute ONG's conclusions. It focused on the fact that the gas/water contact at the location of the Manes wells was some 125 feet lower than at the center of the storage reservoir.[3] This, MRI asserted, showed that the Manes wells

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[3] The gas/water contact is the point below which the pores in the reservoir rock are 100% saturated with water. Gas being lighter than water, it tends to rise; and upon reaching equilibrium over geologic time (40 million years or so) the gas/water contact is essentially horizontal in a reservoir in its native state.

were producing from a stratigraphic trap of gas, an isolated "bubble" unconnected to the storage reservoir. ONG countered with testimony which explained the tilted gas/water contact between the Manes wells and the center of the storage reservoir as resulting from a scientific phenomenon known as "gravity override." Such a phenomenon has been observed in connection with gas repressuring and secondary recovery operations which show that gas injected into a partially depleted reservoir tends to move outward radially along the upper edge of the reservoir, resulting in the tilted gas/water contact. That gravity override was at work here was confirmed by the fact that a series of observation wells drilled at increasing distances from the center of the storage reservoir encountered the gas/water contact at progressively increasing depths. MRI attempted to explain away this physical evidence by contending that each of those wells, by pure happenstance, encountered its own separate "bubble" of gas, an explanation the District Court was moved to describe as "contrived." (App. B, at 13b).

The opinions of the respective experts were in irreconcilable conflict; and in the end, the decision rested squarely on credibility: credibility of the experts as witnesses, and the credibility of their scientific explanations of observed conditions. The District Court frankly acknowledged that the decisive issue was one of credibility, and concluded that the scientific evidence presented by ONG was the more credible (App. B, at 15b).

The Bankruptcy Court issued detailed and comprehensive proposed Findings of Fact and Conclusions of Law (App. C). Because of the existing uncertainty as to the applicable standard of review in the wake of *Northern*

Pipeline Co. v. Marathon Pipeline Company, 458 U.S. 50 (1982), the District Court granted a motion by MRI to disregard the Bankruptcy Court's proposed findings, and after complete *de novo* review, issued its own findings in the form of a detailed and comprehensive Memorandum Opinion (App. B). Upon appeal, the United States Court of Appeals for the Tenth Circuit affirmed (App. A).

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REASONS WHY THE WRIT SHOULD BE DENIED

1. No Issues Raised Are Important Enough To Warrant Review.

None of the reasons enumerated in Sup. Ct. R. 17.1 justifying grant of a writ of certiorari exists in this case. Nor does there exist any reason of a similar nature or of comparable importance.

There is no conflict in decisions by federal courts of appeals on issues of law involved in this controversy; nor is there any conflict between decisions of a federal court of appeals and a state court of last resort. MRI does not assert that any such conflict exists.

This case raises no question of law of sufficient importance to require grant of a writ of certiorari. While of economic importance to the respective litigants, this is but one of literally millions of controversies involving the ownership of property claimed by a bankrupt estate. And it is the importance of a case to the public, rather than to the litigants, that justifies review by certiorari. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79 (1955).

This case presents no substantial federal question or important question of federal law which ought to be decided by this Court; and indeed this case presents no federal question at all. Federal jurisdiction was not founded upon the existence of a substantial federal question; nor even upon diversity of citizenship. The case entered the federal system only because MRI had sought protection of the federal bankruptcy court, and thus a controversy over property rights claimed by it is heard as an adversary proceeding in the bankruptcy court. The case involved state created rights exclusively; and presents no issues of a type justifying review by certiorari. *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956).

The issues presented by the petition are simply not of a nature, nor are they of sufficient importance, to warrant the attention of this Court.

2. The Petition Presents Only Questions of Evidence and Factual Findings.

The only issue advanced by MRI is that the decision, and specifically the existence of a tilted gas/water contact as a basis thereof, is a "physical impossibility." (Pet., at 6). This is a question of fact, at least unless the physical facts claimed to be controlling are " 'demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics or mathematics.' "[4]

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[4] The language quoted above is from *Franks v. Jirdon*, 14 Neb. 693, 14 N.W. 2d 372, 378 (1944) (quoting from *Jones v. Union P.R. Co.*, 141 Neb. 112, 2 N.W. 2d 624 (1942)), relied upon by MRI. (Pet., at 10). Other cases cited by MRI announce the rule in similar terms: *Bennette v. Hader*, 337 Mo. 977, 87 S.W.

(Continued on following page)

The District Court was fully justified in declining to enter a peremptory ruling in MRI's favor on its claim of scientific "impossibility." The evidence was in sharp conflict on the issue. And although MRI sees fit to couch its petition here in terms that the decision of the Tenth Circuit affirming the District Court would "erode the confidence in which the federal judiciary is held," and constitutes a "departure . . . from accepted judicial proceedings" (Pet., at 6, 14), it is obvious that its true complaint is that the District Court simply made the wrong decision. Such a claim is not sufficient to justify grant of a writ of certiorari on account of departure from the accepted and usual course of judicial proceedings (Sup. Ct. R. 17.1(a)).

The Bankruptcy Court personally heard the testimony and observed the witnesses and their demeanor. That court issued detailed Findings of Fact (App. C) which clearly demonstrate that fair minded and objective consideration was given to the contentions advanced by each of the parties and to the evidence of each. The presentation of evidence by both parties followed the familiar legal rules and principles. No significant con-

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2d 413, 418 ("[O]nly in those extraordinary cases where deductions from physical laws and facts so clearly and irrefutably disprove the testimony of witnesses that reasonable minds may not entertain any other conclusion are courts justified in ruling sworn testimony inherently unbelievable and impossible. . . ."); *Newsom v. Glaze*, 215 Ark. 50, 219 S.W. 2d 232, 233 (1949) (quoting from *Lang v. Missouri Pac. R. Co.*, 115 Mo. App. 489, 91 S.W. 1012 (1905)) ("'[C]ourts . . . should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other.'").

troversy arose in connection with the identification of the issues or the presentation of evidence.

Because of uncertainty existing as to the standard of review to be followed, and to a lesser degree because of MRI's contention that the Bankruptcy Court considered inadmissible evidence (action the District Court considered harmless error), the District Court conducted a full and careful *de novo* review of the evidence, and issued a detailed Memorandum Opinion (App. B). That court's findings were its own, and obviously arrived at upon a completely independent review of the evidence. Again, fair minded and objective consideration was given to the contentions and evidence of the respective parties, as the opinion clearly demonstrates. One sentence spotlights both the nature of the issues, and the basis of the decision:

> Thus, in the final analysis, the outcome of this case turns on the credibility of the witnesses, and because the Court finds the testimony of ONG's witnesses, taken as a whole, to be more believable than that of MRI's witnesses, the Court concludes that ONG has sustained its burden of proof.

(App. B, at 15b).

There can be no possible doubt that the factual findings of the District Court are supported by substantial evidence; and indeed, MRI does not contend otherwise.

Upon appeal perfected by MRI, the United States Court of Appeals for the Tenth Circuit affirmed (App. A). That court applied the proper standard of review; and MRI does not contend otherwise. The Tenth Circuit concluded that there was substantial evidence to support the findings and decision of the District Court (App. A, at 2a).

Even when issues calling for review by certiorari exist in a case, "[a] seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors,* 335 U.S. 211, 214 (1948) and cases cited. Similarly, concurrent findings of two (here three) courts below in a case presenting only disputed issues of fact will not call for the exercise of this Court's power of supervision in the absence of a very exceptional showing of error. Such a showing has not been made in this case, and accordingly, MRI's request for writ of certiorari should be denied.

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CONCLUSION

Respondent, Oklahoma Natural Gas Company, submits that none of the grounds enumerated in Sup. Ct. R. 17.1, justifying issuance of a writ of certiorari has been shown; nor do there exist reasons of similar nature or importance. Accordingly, the petition should be denied.

Respectfully submitted,

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